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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CRAIG WILLIAMS, JR., Defendant and Appellant.	B165196 (Los Angeles County Super. Ct. No. TA062285)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed.

Fay Arfa for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Joseph P. Lee and Alan D. Tate, Deputy Attorneys General, for Plaintiff and Respondent.

Craig Williams, Jr., appeals from the judgment entered following a jury trial in which he was convicted of first degree murder and found to have personally and intentionally discharged a firearm proximately causing death. He contends that the

evidence was insufficient to support the verdict. He further contends that the trial court erred in admitting evidence of the victim's spontaneous declaration and of defendant's gang affiliation, in allowing defendant to be questioned about his knowledge of narcotics activities, and in allowing improper rebuttal evidence, and that trial counsel rendered ineffective assistance in failing to make proper objections with respect to these alleged errors. Finally, defendant contends that he was denied his right to counsel of his choice at sentencing. We affirm.

BACKGROUND

On the evening of August 6, 1999, Bruce Battle, his pregnant wife Monique Battle, and the couple's four children were in Compton, an area where Bruce had previously lived.[1] Their purpose was to look for car parts. While in Compton, the family stopped at a chicken restaurant to get Monique something to eat. (The others had previously eaten.) Bruce went inside to get food while Monique drove herself and the children to another location where she could use the bathroom.

When Monique returned to the restaurant, Bruce was waiting outside with a bag of food. Monique stopped to pick him up, and as she climbed across the driver's seat so that Bruce could get in and drive, another car stopped nearby. Defendant got out of the passenger seat of the other car, displayed a gun, and began firing at Bruce. Bruce was able to get into the passenger's seat of his car and Monique drove away from the scene. She stopped at the first intersection she reached, where she attempted to summon help. As Bruce was slumped over in the passenger seat, Monique asked, "'Who did this?'" Bruce said something to the effect of, "'I can't believe he shot me.'" Monique again asked, "'Who?'" and Bruce responded, "'Craig.'" Monique did not know who Craig was.

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[1] For the sake of convenience and clarity, we shall refer to Mr. and Mrs. Battle by their first names.

Bruce, who sustained multiple gunshot wounds, died later that evening from two fatal wounds to the buttocks. Also that evening, Monique was shown a six-pack photograph identification card from which she selected defendant as the shooter, stating that her identification was "positive." She also identified defendant at trial.

Gang expert Los Angeles County Deputy Sheriff Timothy Brennan testified that at the time of the shooting two factions of the Compton gang Atlantic Drive Crips, the Original Gangsters (O.G.'s.) and the Baby Gangsters (B.G.'s), were battling each other over control of narcotics sales in the neighborhood, parts of which were controlled by each faction. Bruce was an O.G. and defendant was a B.G. The conflict had led to several murders, including defendant's cousin and one of his close associates. Deputy Brennan was of the opinion that Bruce had been killed in retaliation for the earlier murders of members of the B.G. faction.

Testifying in his own behalf, defendant denied that he or his cousins were members of a gang or that he had any knowledge of Bruce's murder or of narcotics activities in the neighborhood. Although defendant lived close to the murder scene and Deputy Brennan knew where defendant lived, defendant was not arrested until November 2001. Defendant denied telling Brennan at a 1999 funeral of a B.G. member that the B.G. had been murdered by an O.G. Defendant acknowledged that he knew Christopher Trimble very well but denied having admitted to Trimble that he (defendant) shot Bruce.

In rebuttal, Trimble testified that he had been a B.G. and was acquainted with defendant. He had earlier told the police that defendant was involved in Bruce's murder, but testified at trial that he did so only because he had been coerced. A deputy district attorney who had participated in an interview of Trimble testified that, in the interview, Trimble said he had been told he would be in trouble if he testified in this case.

Also in rebuttal, Brennan testified that at the 1999 B.G. funeral, defendant told him that an O.G. had killed the B.G. because of the ongoing conflict between the two factions. Brennan had had other conversations with defendant, during which defendant admitted that he was a B.G. Brennan was of the opinion that if a B.G. whose B.G.-cousin had been killed by an O.G. then killed an O.G., the B.G. would get revenge and also gain

status and prestige in the entire gang community. The B.G. would also instill fear in O.G. members and intimidate them. The more violent the crimes, the more fear will be instilled.

DISCUSSION

1. Sufficiency of the Evidence

Defendant contends that the identification evidence was insufficient to support his conviction because when Monique described the incident to the police she could not provide the perpetrator's exact height and could not precisely describe the car from which he emerged, and when she selected defendant from the six-pack she initially had difficulty in choosing between two of the photographs. Defendant additionally contends that because Bruce was shot in the back, Bruce could not have seen the perpetrator and therefore could not have accurately identified him as Craig. Defendant's contention is without merit.

It is fundamental that evidence will be deemed sufficient to support a conviction where, upon review of the entire record, it is found to be reasonable, credible and of solid value. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 [99 S.Ct. 2781, 2789]; *People v. Johnson* (1980) 26 Cal.3d 557, 576–577.) "In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) "It is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.] '"To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"' [Citations.] Further, a jury is entitled to reject some portions of a

witness' testimony while accepting others. [Citation.] Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623; accord, *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

There was nothing physically impossible or inherently improbable about Monique's identification of defendant in this case. Accordingly, the identification evidence was sufficient to support defendant's conviction.

2. Hearsay Statement

Monique's testimony that Bruce said "Craig" had shot him came in after defendant's hearsay objection was overruled based on the spontaneous statement exception to the hearsay rule. (Evid. Code, § 1240.) Defendant contends that the objection should have been sustained. Alternatively, he contends that the spontaneous statement exception is no longer viable under the recent decision of *Crawford v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 1354] (*Crawford*). Defendant further contends that Bruce's statement was inadmissible as a dying declaration and that the dying declaration exception to the hearsay rule is also no longer viable under *Crawford*. We disagree with defendant's contentions regarding the spontaneous statement exception and therefore do not address his contentions regarding dying declarations.

a. Evidence Code section 1240

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

"'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers

to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]

"'The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.] [¶] The basis for this circumstantial probability of trustworthiness is "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief."' [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

"'The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance — how long it was made after the startling incident and whether the speaker blurted it out, for example — may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 541, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 903–904, overruled on another point in *People v. Waidla* (2002) 22 Cal.4th 690, 724, fn. 6.)

Given that Bruce made his statement to Monique a short time after he had sustained multiple gunshot wounds (two of which proved to be fatal), there is no basis upon which to conclude that the trial court abused its discretion in admitting the statement under the spontaneous statement exception to the hearsay rule.

b. *Crawford*

In *Crawford,* the United States Supreme Court held that where out-of-court "testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (___ U.S. at p. ___ [124 S.Ct. at p. 1374].) But "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such

statements from Confrontation Clause scrutiny altogether. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*)

"*Crawford* strongly suggested that a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial." (*People v. Cage* (July __, 2004) ___ Cal.App.4th ___, ___ [2004 D.A.R. 8563, 8568].) The precedent on which *Crawford* relied "suggest[ed] that the statement is being memorialized somehow, which sets at least a minimum required degree of formality. And it confirms that the participants must be anticipating a trial." (*Ibid.*; see *Crawford*, *supra*, ___ U.S. at p. ___ [124 S.Ct. at p. 1364] ["An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"].)

The "comprehensive definition of 'testimonial'" that *Crawford* left for another day is not needed to establish that Bruce's spontaneous statement to his wife, uttered shortly after he had been shot and within the hearing of only members of his family, was not "testimonial." Accordingly, *Crawford* does not undermine the trial court's ruling that the statement was admissible, and defendant's argument to the contrary must be rejected.

3. Gang Evidence

During the course of trial defendant lodged several objections under Evidence Code section 352 to the introduction of gang evidence. On appeal, defendant contends that the trial court erred in allowing the introduction of evidence that a rivalry existed between the O.G. and the B.G. factions of the Atlantic Drive Crips and that the rivalry involved control of narcotics sales. Defendant further contends that the trial court erred in allowing expert opinion that a gang member would gain status by killing a member of a rival gang faction, on the ground that the expert was improperly testifying as to defendant's subjective intent. There is no merit in these contentions.

"The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of

reason. [Citation.] Evidence of gang activity and affiliation is admissible where it is relevant to issues of motive and intent [citations], and, while admissible evidence often carries with it a certain amount of prejudice, Evidence Code section 352 is designed for situations in which evidence of little evidentiary impact evokes an emotional bias. [Citation.]" (*People v. Olguin (*1994) 31 Cal.App.4th 1355, 1369.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724; see *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [admission of gang evidence reviewed for abuse of discretion].)

"An expert may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 651; Evid. Code, § 801, subd. (a); *People v. Ochoa* (2001) 26 Cal.4th 398, 438; *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Expert testimony "concerning the culture, habits, and psychology of gangs" meets this criterion. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 617.) Such testimony may include "an individual defendant's membership in, or association, with, a gang [citations], . . . *motivation for a particular crime, generally retaliation or intimidation* [citations], . . . [and] rivalries between gangs [citation] . . . ." (*People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 657, italics added, fns. omitted; see also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) Such testimony may also address the ultimate issue in the case (Evid. Code, § 805; *People v. Killebrew*, *supra*, 103

Cal.App.4th at p. 651) and may be based on hypothetical questions derived from the facts of the case (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618).

Here, evidence of the conflict over control of neighborhood narcotics sales between the B.G.'s and the O.G.'s, rival factions of a gang to which defendant and Bruce respectively belonged, was extremely probative on the issue of motive for the shooting. Nothing about admission of this evidence posed a risk to the fairness of the proceedings or the reliability of the outcome of trial.

And contrary to defendant's contention that some of the testimony of Deputy Brennan went to defendant's subjective intent, this was not the type of situation as in *People v. Killebrew*, *supra*, 103 Cal.App.4th at page 652, on which defendant relies. There, error was found in permitting a gang expert to testify "that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Ibid*., fn. omitted.) In contrast to *Killebrew*, Deputy Brennan's testimony as to revenge, prestige, and opportunity for intimidation to be gained from killing a member of a rival gang is precisely the type of evidence that is admissible to show the "culture, habits, and psychology of gangs." (*People v. Valdez*, *supra*, 58 Cal.App.4th at p. 506.) There was no error in the admission of gang evidence in this case.

4. Inquiry Into Defendant's Narcotics Activities

In a sidebar conference during cross-examination of defendant, the prosecutor noted that defendant, who lived in B.G. territory, had two prior convictions for narcotics sales. The prosecutor requested that, in addition to impeaching defendant with the fact of his prior convictions, the prosecutor also be allowed to ask about narcotics activities in the neighborhood. In support of this request, the prosecutor theorized that it would be impossible to conduct narcotics activities in the neighborhood without "blessings or taxes paid" to the Atlantic Drive Crips, and defendant's knowledge of narcotics activities would therefore impeach his expected denial that he was a member of the B.G.'s. Defendant objected to this line of questioning and his objection was overruled.

When cross-examination resumed, defendant admitted he had sustained a prior conviction for narcotics transportation or sales and that he had lived in a neighborhood which the gang expert testified was identified with the B.G.'s. Defendant denied knowing whether the Atlantic Drive Crips controlled narcotics transactions in the neighborhood or whether the neighborhood was a hangout for the B.G.'s.

Defendant contends that the prosecutor's line of inquiry was improper because it was irrelevant and unduly prejudicial. We disagree. The explanation by the prosecutor established the relevance of the evidence. And given that defendant had no ground for objecting to impeachment with the fact of his prior narcotics convictions (see Evid. Code, § 788), the additional inquiry into his knowledge of narcotics activities in the neighborhood would not have evoked undue emotional bias against defendant.

5. Rebuttal Evidence

Defendant contends that the prosecution's rebuttal evidence was improper because it should been presented in its case-in-chief. We disagree.

"Proper rebuttal evidence is restricted to that made necessary by the defendant's case '"in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. [Citations.] A defendant's reiterated denial of guilt and the principal facts that purportedly establish it does not justify the prosecution's introduction of new evidence to establish that which defendant would clearly have denied from the start."' (*People* v. *Thompson* (1980) 27 Cal.3d 303, 330 [], quoting from *People* v. *Carter* (1957) 48 Cal.2d 737, 753–754 [].)" (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1302.) Admission of rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed upon appeal in the absence of palpable abuse. (*People v. Carrera* (1989) 49 Cal.3d 291, 323.)

The prosecution here did not "sandbag" defendant by intentionally holding back evidence more appropriately presented in its case-in-chief in an effort to give that evidence greater emphasis. (*People v. Carter*, *supra*, 48 Cal.2d at pp. 753–754; accord, *People v. Carrera*, *supra*, 49 Cal.3d at pp. 322–323.) In the case-in-chief, Deputy Brennan testified that defendant was a member of the B.G. gang, that the B.G.'s and the

O.G.'s were battling each other over the neighborhood narcotics trade, and that several murders had resulted, including Bruce's, in retaliation. It was only after defendant took the stand and unequivocally denied membership in the B.G. gang and knowledge of narcotics sales in the neighborhood that Brennan testified on rebuttal that defendant had conceded B.G. membership to Brennan and further testified regarding the revenge that a B.G. member would exact against an O.G. under the circumstances that existed here. And the prosecutor could hardly be faulted for not wanting to highlight the testimony of a recanting "snitch" in his case-in-chief. Thus, when defendant acknowledged knowing Trimble very well but denied having confessed to him, we cannot say that the trial court, if faced with an objection to rebuttal testimony on this subject or with respect to Brennan's rebuttal testimony (and no such objections were made here), would have "palpably abused" its discretion in overruling the objections. (See *People v. Thompson*, *supra*, 27 Cal.3d at pp. 331–332 [portion of defendant's confession properly admitted in rebuttal].)

6. Ineffective Assistance of Counsel

Defendant contends that trial counsel rendered ineffective assistance to the extent he failed either to lodge any objection or to make his objections on appropriate grounds, including under the state and federal Constitutions, to the evidence which is the subject of issues Nos. 2–5, *ante*. But as we have discussed, all of this evidence was properly admitted. Accordingly, defendant has failed to demonstrate that counsel's lack of objections fell below an objective standard of reasonableness, thereby fatally undermining his ineffective counsel claim. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

7. Request for New Counsel

At a probation and sentencing hearing, defendant's motion for a new trial was heard and denied. Thereafter, during a discussion regarding continuing the matter for imposition of sentence, defendant told the court that he "wanted to make a statement before you sentence me on the case." Defendant stated as follows: "Basically I been here 14 months. And I have been asking my lawyer here for the paperwork on my case

and he is constantly denying me on my paperwork. My parents contact him and he doesn't return calls or visit me. [¶] I want the court — to let the court know that I think he is ineffective counsel. Some paperwork I gave him myself and pictures he even refuses to give me now. And to be honest with you, I don't really want him to represent me on this new trial motion." Following this statement, the trial court asked the prosecutor to leave the courtroom.

With the prosecutor gone, defendant complained that he had consistently asked counsel for his paperwork and that counsel had failed to provide it. Defendant further stated that during trial he had wanted to point out certain things to counsel, and "if I have my paperwork, I feel my case becomes a little bit better." Defense counsel explained that he did not provide the file to defendant "because paperwork circulates throughout the whole jail and before you know it, you have a lot of evidence going against your client." Citing *People v. Smith* (1993) 6 Cal.4th 684, the trial court stated that following a guilty verdict a defendant is entitled to the appointment of new counsel if current appointed counsel has rendered ineffective assistance or an irreconcilable conflict has developed between the defendant and counsel. The trial court concluded that neither ground was present in this case and denied defendant's request for new counsel.

As aptly noted by defendant in argument on appeal, his trial counsel was *retained*, and *People v. Marsden* (1970) 2 Cal.3d 118 and *People v. Smith*, *supra*, 6 Cal.4th 684, which applied *Marsden* to post-verdict situations, involve the substitution of *appointed* counsel. Nevertheless, we reject defendant's contention that, in applying the *Marsden*/*Smith* standard, "the trial court denied [defendant] his right to new counsel at the motion for new trial and sentencing."

"The right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing. [Citations.]' [Citation.]" (*People v. Courts* (1985) 37 Cal.3d 784, 789.) The defendant has the right to decide whether to discharge retained counsel. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) And "'[a] necessary corollary [of the right] is that a defendant must be given a reasonable opportunity to employ and consult with counsel . . . .'" (*People v. Courts*, *supra*, 37 Cal.3d at p. 790.) But the right

to retained counsel of the defendant's choosing "is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 983.)

Here, defendant could not have been denied his right to a new attorney on the motion for a new trial because he did not bring up the subject of dissatisfaction with current counsel until after the motion had been heard and denied. In addition, at no time did defendant state that he had retained new counsel, or even request an opportunity to seek new counsel or to represent himself. Rather, all defendant did was to make a general statement that he did not want current counsel to represent him on the new trial motion after it had been denied. Under these circumstances, defendant was not prejudiced by the trial court's application of the *Marsden*/*Smith* standard in denying what it incorrectly interpreted as a request to discharge appointed counsel. (See *People v. Lara* (2001) 86 Cal.App.4th 139, 156.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.